UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1824

VIRGIN ISLANDS NATIONAL BANK

v.

BETTY JEAN TYSON and KENNETH B. TYSON

Betty Jean Tyson, Appellant

D.C. Civil Action No. 188-1972

APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Argued December 6, 1974

Before SEITZ, *Chief Judge*, VAN DUSEN and ROSENN, *Circuit Judges*

ROBERT F. STEEVES, ESQUIRE
416 Washington Building
Washington, D.C.
Attorney for Appellant

THOMAS W. FINUCAN, ESQUIRE
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St. Thomas, Virgin Islands
Attorney for Appellee

OPINION OF THE COURT

(Filed December 30, 1974)

ROSENN, *Circuit Judge*

The sole question presented in this appeal is whether the district court abused its discretion in refusing to relieve appellant from an order confirming the judicial sale of her real estate.

On July 13, 1972, the Virgin Islands National Bank (Bank) obtained summary judgment in an action to foreclose on a mortgage note for $165,000 executed by appellant Betty Jean Tyson. A writ of execution issued pursuant to which the United States Marshal conducted a judicial sale of Mrs. Tyson's real estate on April 18, 1973. The Marshal made return of the writ on June 18, 1973.

The Bank filed a motion to confirm the sale on June 28, 1973. On July 10, the Bank served notice on Tyson that the motion would be heard on July 16. Meanwhile, the judgment debtor not having filed any objections to the sale, the district court granted the Bank's motion on July 5 without a hearing.

Mrs. Tyson filed a Motion for Order to Reopen Case and Amend Judgment on January 8, 1974, which the district court denied[1] on February 12. Mrs. Tyson filed another motion, styled a Motion for Order to Set Aside Judicial Sale, on February 14. This second motion was denied on March 4 after a hearing. On April 2 Mrs. Tyson filed a notice of appeal from the order of March 4.

Mrs. Tyson characterizes her second motion as one for relief from the confirmation order pursuant to rule 60(b) of the Federal Rules of Civil Procedure. We shall so treat it, although the motion nowhere states the basis upon which

1. In the order of dismissal, the district court stated:
Under the provisions of Rule 6 of the District Court of the Virgin Islands . . . oral hearing on a motion is not required and the Court in its discretion, the moving papers being in order, is fully authorized to act on the motion as it, in this case did.

relief is sought. *See United States v. Backofen,* 176 F.2d 263, 266 (3d Cir. 1949).

A party moving under rule 60(b) for relief from a judgment, order, or proceeding must clearly establish the grounds therefor to the satisfaction of the district court. *Federal Deposit Ins. Corp. v. Alker,* 234 F.2d 113, 116-17 (3d Cir. 1956). The district court's ruling on the motion is reviewable in this court only for abuse of discretion. *Estate of Murdoch v. Pennsylvania,* 432 F.2d 867, 870 (3d Cir. 1970); *Tozer v. Charles A. Krause Milling Co.,* 189 F.2d 242, 244 (3d Cir. 1951). We find no abuse of discretion and therefore affirm.

The Legislature of the Virgin Islands has specified the procedure to be followed in confirming the judicial sale of real property. 5 V.I.C. § 489. Section 489 provides in part:

> (1) The plaintiff in the writ of execution shall be entitled, on motion therefor, to have an order confirming the sale, unless the judgment debtor, or his representative in case of his death, files with the clerk his objections thereto within five days after the return thereof.
>
> (2) If such objections are filed, the court shall, notwithstanding, allow the order confirming the sale, unless on the hearing of the motion it shall satisfactorily appear that there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting. In the latter case, the court shall disallow the motion and direct that the property be resold, in whole or in part, as the case may be, as upon an execution received on that date.

Mrs. Tyson's contention that she was entitled to a hearing before the confirmation order was issued may not be presented in a rule 60(b) motion. Under section 489(1), she had until five days after return of the writ—in this instance, 66 days after the judicial sale—to file objections

based on substantial irregularities in the conduct of the sale. Upon her failure to file or move for enlargement of the time for filing objections, the district court had the power to enter an order confirming the sale without a hearing.[2] Thus, the only question presented by Mrs. Tyson's rule 60(b) motion is whether, despite her failure to object within the time limits specified by statute, she should be relieved from the confirmation order.

Mrs. Tyson advances several grounds [3] upon which she contends that relief from the confirmation order should have been granted by the district court:

(1) The notice of the judicial sale contained an inadequate description of the real estate to be sold.

(2) The seven contiguous parcels of real estate should have been offered, not only as a whole, but separately as well.

(3) The sole bid, made by the Bank, was grossly inadequate.

(4) The Bank learned before the sale that at least one other person might bid if the sale were postponed, but may have failed to communicate this information to the Marshal; if the information was communicated to the Marshal, his failure to postpone the sale in order to increase the number of bidders vitiated its validity.

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2. We need not decide whether a district court, in appropriate circumstances, may consider objections which are filed out of time. *See* Lucerne Investment Co. v. Estate Belvedere, Inc., 7 V.I. 275, 278 (D. V.I. 1969).

3. In addition to the four grounds enumerated, Mrs. Tyson contends that the confirmation order should have been vacated since the Bank would not permit redemption of her real estate three days after the six-month redemption period expired. Tyson apparently contends that, since the last day for redemption fell on a holiday, she was entitled to redeem on the next business day. Mrs. Tyson did appear at the Bank, which was the wrong place for redemption, on the next business day, but failed to make tender of the money for redemption. The district court did not abuse its discretion in rejecting this ground for relief.

Even were we to assume that Mrs. Tyson was wrongly denied her right to redeem, we doubt that she would be entitled to an order setting aside the judicial sale, although she might be entitled to an order extending the redemption period.

Mrs. Tyson has offered no evidence which would justify her failure to object on the first three grounds within the time specified by statute. 5 V.I.C. § 489(1); *see* Fed. R. Civ. P. 60(b)(1), (2). Clearly she knew or should have known the manner in which her real estate was advertised, offered, and sold by the time the period for filing objections expired. Judicial sales must have finality and judgment debtors may not assert untimely challenges on the basis of irregularities which were readily ascertainable before the close of the statutory period for filing objections.

With respect to her fourth ground for relief, Tyson may not have learned until after the period for filing objections that the Bank had knowledge of others who might have bid if the sale had been postponed. However, she has not proven that the Bank failed to communicate its knowledge to the Marshal. Moreover, assuming that the information concerning potential bidders was communicated to the Marshal, the judgment debtor here has not shown that the Marshal abused the discretion vested in him to postpone the sale. *See* 5 V.I.C. § 486. Thus, Mrs. Tyson has not demonstrated that she has a meritorious defense to confirmation of the sale and is not entitled to her fourth ground to the extraordinary relief provided by rule 60(b). *See* In re *Miller*, 262 F. Supp. 295, 297 (E.D. Ill. 1967).

In addition to the grounds enumerated individually above, Mrs. Tyson contends that, taken together, they entitle her to relief under reason (6) of rule 60(b).

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> • • •
>
> (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). As indicated above, we are not persuaded by the individual grounds for relief raised by Mrs. Tyson. We do not believe that, considered collectively, they assume greater weight.

The order of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 74-1824

VIRGIN ISLANDS NATIONAL BANK

v.

BETTY JEAN TYSON and KENNETH B. TYSON,
BETTY JEAN TYSON, *Appellant*

(D.C. Civil No. 188-1972)

On Appeal From the District Court of the Virgin Islands,
Division of St. Thomas and St. John

Present: SEITZ, *Chief Judge*, and VAN DUSEN and ROSENN,
Circuit Judges.

Judgment

(December 30, 1974)

This cause came on to be heard on the record from the District Court of the Virgin Islands Division of St. Thomas and St. John, and was argued by Counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, dated March 4, 1974, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

/s/ T. F. QUINN
T. F. Quinn, *Clerk*

Dated: December 30, 1974

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 188/1972

VIRGIN ISLANDS NATIONAL BANK, *Plaintiff*,

v.

BETTY JEAN TYSON AND KENNETH B. TYSON, *Defendants*.

Action for Debt and Foreclosure

Order Confirming Sale

(July 5, 1973)

This cause came on for further hearing on the Motion of Plaintiff, VIRGIN ISLANDS NATIONAL BANK, to confirm the sale made herein on the 18th day of April, 1973 by the U. S. Marshal, pursuant to the Judgment herein entered on the 13th day of July, 1972, and being advised in the premises, it is herewith,

Ordered that the report of said U.S. Marshall of said sale made by him as therein set forth be and the same is hereby approved and confirmed and it is further

Ordered, Adjudged, and Decreed that a proper and legal conveyance of all the property so sold be executed and delivered forthwith by said U.S. Marshal to said VIRGIN ISLANDS NATIONAL BANK, the purchaser to whom the same was sold.

Dated: July 5, 1973

/s/ ALMERIC L. CHRISTIAN,
Almeric L. Christian,
Chief Judge of the District Court

(Caption Omitted in Printing)

Order

(February 12, 1974)

Defendants herein have moved the Court for an order reopening the above captioned cause and amending the Judgment entered on July 13, 1972, as well as the Order Confirming Judicial Sale entered by this Court on July 5, 1973. Their request is grounded on allegations made on the said defendants behalf that counsel for the plaintiff in moving for an order to confirm the judicial sale upon foreclosure had noticed his motion for the 16th day of July, 1973, and had served defendants with such motion and notice thereof, whereas, in fact, the Court as of July 5, 1973, entered its Order Confirming the Sale. The record reflects that the motion to confirm the sale was filed with the Court on June 28, 1973. Under the provisions of Rule 6 of the District Court of the Virgin Islands (T.5 App. V R 6), oral hearing on a motion is not required and the Court in its discretion, the moving papers being in order, is fully authorized to act on the motion as it, in this case, did.

The premises considered therefore and the Court being fully advised,

It Is Ordered that the above mentioned motion of the defendants be, and the same is hereby denied.

Dated at Charlotte Amalie, St. Thomas, U.S. Virgin Islands this 12th day of February, 1974.

Enter:

/s/ Almeric L. Christian
Almeric L. Christian
Chief Judge

(Caption Omitted in Printing)

Order

(March 4, 1974)

Defendant, Betty Jean Tyson, filed a Motion dated February 15, 1974, entitled Motion for Order to Set Aside Judicial Sale. Hearing on said Motion came before the Court on March 4, 1974 and the Court having heard testimony on behalf of defendant, Betty Jean Tyson, testimony on behalf of the plaintiff, exhibits offered at the time of hearing, and briefs and arguments presented by counsel, and being fully advised in the premises;

Now THEREFORE, it is hereby ORDERED that the said Motion be, and it hereby is, denied. Each of the parties shall bear their own attorneys' fees and costs.

Dated: March 4, 1974.

/s/ ALMERIC L. CHRISTIAN
Almeric L. Christian
Chief Judge of the District Court

FEDERAL RULES OF CIVIL PROCEDURE

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein aising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his

legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, effective March 19, 1948; Dec. 29, 1948, effective Oct. 29, 1949.

5 V.I. Code § 489

§ 489. Confirmation of sale of real property

Whenever real property is sold on execution the provisions of this section shall apply to the subsequent proceedings:

(1) The plaintiff in the writ of execution shall be entitled, on motion therefor, to have an order confirming the sale,

unless the judgment debtor, or his representative in case of his death, files with the clerk his objections thereto within five days after the return thereof.

(2) If such objections are filed, the court shall, notwithstanding, allow the order confirming the sale, unless on the hearing of the motion it shall satisfactorily appear that there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting. In the latter case, the court shall disallow the motion and direct that the property be resold, in whole or in part, as the case may be, as upon an execution received on that date.

(3) Upon the return of the execution, the marshal shall pay the proceeds of the sale to the clerk, who shall then apply the same, or so much thereof as may be necessary, in satisfaction of the judgment. If an order of resale is afterwards made, and the property sells for a greater amount to any person other than the former purchaser, the clerk shall first repay to such purchaser the amount of his bid out of the proceeds of the latter sale.

(4) Upon a resale the bid of the purchaser at the former sale shall be deemed to be renewed and continue in force, and no bid shall be taken except for a greater amount. An order confirming a sale shall be a conclusive determination of the regularity of the proceedings concerning such sale, as to all persons, in any other action, or proceeding whatever.

(5) If after the satisfaction of the judgment, there are any proceeds of the sale remaining, the clerk shall pay such proceeds to the judgment debtor, or his representatives, as the case may be, at any time before the order is made, upon the motion to confirm the sale, provided such party files with the clerk a waiver of all objections made or to be made to the proceedings concerning the sale; but if the sale is confirmed, such proceeds shall be paid to such party of course, otherwise, they shall remain in the custody of the clerk until the sale of the property has been disposed of.

Local Rule 6. District Court for the Virgin Islands

Rule 6. Motions

(a) MOTIONS SHALL BE IN WRITING. All motions, including objections to interrogatories and requests for admissions, unless made during a hearing or trial, shall be in writing.

(b) GROUNDS FOR MOTIONS. All motions shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

(c) SIGNING OF MOTIONS. Every motion shall be signed by at least one attorney of record in his individual name. The signature of an attorney constitutes a certificate by him that he has read the motion; that to the best of his knowledge, information and belief there are good grounds to support it; and that it is not interposed for delay.

(d) DOCUMENTS SUPPORTING MOTIONS. When allegations of facts not appearing of record are relied upon in support of a motion, all affidavits and other pertinent documents then available shall accompany the motion. All such documents not then available shall be filed before the hearing of the motion.

(e) BRIEF SUPPORTING MOTIONS. Motions shall be accompanied by a brief which shall contain a concise statement of reasons in the support of the motions, and citation of authorities upon which the movant relies.

(f) RESPONSE AND BRIEF. If the respondent opposes a motion, he shall file his response, including brief and such supporting documents as are then available, within five (5) days after service of the motion. Briefs shall contain a concise statement of reasons in opposition to the motion, and a citation of authorities upon which the respondent relies. For good cause appearing therefor, a respondent may be required to file his response and supporting documents, including brief, within such shorter period of time as the

court may specify, or may be given additional time upon request made to the court.

(g) Service of Motion and Response. The movant and respondent shall serve copies of their respective papers upon opposing counsel before they are filed with the clerk, and such papers must indicate the time and method of service.

(h) Request for Oral Argument. Oral argument may be had on written notice therefor, or the court may, in its discretion, order oral arguments on any motion. A request for oral argument shall be separately stated by the movant or respondent at the conclusion of the motion or response.

(i) Failure To File and Serve Motion Papers. Upon failure of movant to file a brief in support of the motion, the court may automatically deny the motion for failure to conform to subsection (e). Upon failure of respondent to file a response and brief in opposition to the motion, the court may treat the motion as conceded and render whatever relief is asked for in the motion.

(j) Hearings on Motion. No motion shall be set for hearing until and unless the motion, objections to the motion and all supporting briefs and documents have been filed with the court. Motions filed which are not in conformity with this rule shall not be entertained by the court.

(k) Any Local Rule inconsistent with this Rule is hereby repealed.—Added Sept. 24, 1964.